UNITED STATES AIR FORCE COURT OF CRIMINAL APPEALS

UNITED STATES

v.

Airman First Class CHRISTOPHER S. BARRETT
United States Air Force

ACM 35790

28 February 2006

Sentence adjudged 12 April 2003 by GCM convened at Kadena Air Base, Okinawa, Japan. Military Judge: Dawn R. Eflein.

Approved sentence: Bad-conduct discharge, confinement for 2 months, total forfeitures of all pay and allowances, and reduction to E-1.

Appellate Counsel for Appellant: Colonel Carlos L. McDade, Major Terry L. McElyea, Major Andrea M. DeCamera, Major Sandra K. Whittington, and Captain David P. Bennett.

Appellate Counsel for the United States: Colonel LeEllen Coacher, Lieutenant Colonel Gary F. Spencer, Lieutenant Colonel Robert V. Combs, Major Kevin P. Stiens, and Captain Stacey J. Vetter.

Before

STONE, SMITH, and MATHEWS
Appellate Military Judges

OPINION OF THE COURT

MATHEWS, Judge:

The appellant was tried before a panel of officer and enlisted members at Kadena Air Base, Japan. He was convicted, in accordance with his pleas, of divers wrongful uses of marijuana, and also convicted, contrary to his pleas, of a single wrongful distribution of Percocet, all in violation of Article 112a, UCMJ, 10 U.S.C. § 912a. The convening authority approved the findings and sentence as adjudged. On appeal, the appellant asserts the military judge erred by conducting,

over defense objection, a proceeding to clarify the members' findings with regards to the litigated specification. Finding no error, we affirm.

Background

The specification in question, as referred to trial, alleged the appellant wrongfully distributed Percocet on divers occasions. The members entered findings by exceptions and substitutions, convicting the appellant of only a single wrongful distribution. The members did not specify which of the distributions alleged by the government was proven beyond a reasonable doubt.

After announcement of the findings, but prior to the authentication of the record and action by the convening authority, our superior court rendered its decision in *United States v. Walters*, 58 M.J. 391 (C.A.A.F. 2003). In *Walters*, the court held when an accused is charged with divers acts of misconduct but convicted of only a single act, the findings by exceptions and substitutions must clearly reflect the specific instance of misconduct upon which the finding is based. *Id.* at 396. Failure to do so renders the finding too ambiguous for meaningful appellate review. *Id.* at 397.

The military judge alertly recognized the significance of *Walters* to the case sub judice. She promptly notified the parties of her intent to hold a post-trial session, pursuant to Rule for Courts-Martial (R.C.M.) 1102, in order to clarify the findings in accordance with *Walters*. At that session, she properly advised the members they were not to engage in further deliberations or voting, but merely to address whether they had, in their deliberations prior to announcement, settled on a specific instance in which the appellant wrongfully distributed Percocet. If their deliberations had not been so precise, they were to inform the court; however, if they had determined a specific instance in their original deliberations, they were to inform the court which of the alleged distributions was the basis for their original findings.

When instructing the members, the military judge repeatedly stressed they were *not* to deliberate or reconsider their findings in an effort "to be more specific now," but only to "recall what you did in deliberations and voting" in the first place. The members requested the opportunity to review some of the evidence presented at trial on the litigated specification, and twice sought further guidance from the military judge to ensure they properly completed their task. The President of the court told the military judge the members had, in fact, reached an agreement as to a specific incident during their original closed session deliberations – an incident confessed to by the appellant in a written statement to the Air Force Office of Special Investigations.

Analysis

The military judge did not err in conducting the post-trial proceeding. Although the appellant contends before us, as he did at the proceeding in question, that *Walters* does not permit efforts to clarify findings once they have been announced, the plain language of the decision is not so sweeping. *Walters* expresses a preference for clarification prior to announcement, and so do we; but *Walters* does not forbid clarification after announcement, and we are confident that the Court of Appeals for the Armed Forces would have used mandatory language – "shall," rather than "should" – had that been its intent. *Walters,* 58 M.J. at 396 n.5.

We further conclude the military judge properly instructed the members, stressing in clear and unambiguous terms they were not to *find* a specific instance, but merely to advise the court whether they *had found* a specific instance, and if so, what it was. In the absence of contrary evidence, we presume the members followed these instructions. *See United States v. Thompkins,* 58 M.J. 43, 47 (C.A.A.F. 2003). Moreover, examining the record as a whole, we are satisfied that is precisely what they did. The presentation of evidence on the litigated specification spanned over 170 pages of the record, including the testimony of 11 witnesses and presentation of 5 documentary exhibits. During the R.C.M. 1102 proceeding, the members focused immediately on a single document and a single witness' testimony – just 11 pages in length – to refresh their recollection as to the person and place involved in the drug transaction. That they did not ask for the entire record belies any effort to re-deliberate on findings.

Conclusion

We considered the appellant's additional assignment of error and resolve it adversely to him. *See United States v. McDonald*, 57 M.J. 18, 20 (C.A.A.F. 2002) (citing *United States v. Maxwell*, 45 M.J. 406, 424 (C.A.A.F. 1996)). The findings and sentence are correct in law and fact, and no error prejudicial to the substantial rights of the appellant occurred. Article 66(c), UCMJ, 10 U.S.C. § 866(c); *United States v. Reed*, 54 M.J. 37, 41 (C.A.A.F. 2000). Accordingly, the findings and sentence are

AFFIRMED.

OFFICIAL

ANGELA M. BRICE
Clerk of Court